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No. 639

IN THE

Supreme Court of the United States

October Term, 1958

SEABOARD & WESTERN AIRLINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

and

PAN AMERICAN WORLD AIRWAYS, INC., and
TRANS WORLD AIRLINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

Supreme Court of the United States

October Term, 1958

No.

Seaboard & Western Airlines, Inc.,
Petitioner,

v.

Civil Aeronautics Board,
Respondent,

and

Pan American World Airways, Inc., and
Trans World Airlines, Inc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia Circuit which set aside an order entered by the Civil Aeronautics Board.

OPINIONS BELOW

The opinion of the Court of Appeals is printed as Appendix A hereto. It is not yet reported. The order of the Civil Aeronautics Board, together with its findings is not as yet reported but appears at pages 105-110 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on 14 November 1958. It is printed as Appendix B hereto. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1245 (1).

QUESTIONS PRESENTED

Under section 401 of the Civil Aeronautics Act, 52 Stat. 987, as amended, 49 U.S.C. § 481, an air carrier can carry persons, property or mail in air transportaion only under authority of a certificate of public convenience and necessity. Seaboard & Western Airlines, Inc., has certificate authority to provide transAtlantic ajr transportation of property but not of mail.

The Civil Aeronautics Board, under section 416 of the Act, 52 Stat. 1004, as amended, 49 U.S.C. § 496, is empowered to exempt air carriers from the requirements of section 401, supra, upon a finding that enforcement of the section 401 requirement is not in the public interest, and that such requirement "is or would be an undue burden on such air carrier . . . by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier. . . ."

Seaboard applied for an amendment to its certificate which would authorize Seaboard to carry mail. R. 26. Subsequently Seaboard filed an application requesting an exemption under section 416 of the Act, supra, from the requirements of section 401 of the Act, so that Seaboard could carry mail pending ultimate disposition of its mail certificate amendment case. R. 49. The Board granted the exemption authority requested by Seaboard. R. 105.

The court below set aside the Board's order, holding that the Boards findings were insufficient under section

416 (b) of the Act. App. A. This Court order raises the following questions:

1) In Section 416 of the Civil Aeronautics Act, does the term "limited extent" refer to the pre-existing conditions of the carrier's operations, or to the scope of the exemption itself?

2) Can financial distress and need for revenues if sufficiently acute, constitute unusual circumstances supporting a finding of undue burden under section 416 of the Civil Aeronautics Act?

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938 are set forth as Appendix C hereto.

STATEMENT

Under Title IV of the Civil Aeronautics Act,[1] the Civil Aeronautics Board has full responsibility and authority for the economic regulation of the air transportation industry. There are provisions in this Title which apply to every aspect of common carrier transportation by air: the securing of original operating authority and of permission to suspend or abandon service (section 401, *supra*); the filing, adherence to, and changes in tariffs (section 403, 52 Stat. 992, 49 U.S.C. § 483, and section 404, 52 Stat. 993, 49 U.S.C. § 484); mail transportation, subsidy support (section 406, 52 Stat. 998, 49 U.S.C. § 486); regulation of accounts, records and reports, disclosure of stock ownership, form of accounts (section 407, 52 Stat. 1000, 49 U.S.C. § 487); mergers, consolidations,

[1] The Federal Aviation Act of 1958, 72 Stat. 731, *et seq.*, which became effective December 31, 1958, reenacted the provisions here involved without material change. Reenactment was for purposes of draftsmanship only. H.Rep. No. 2360, 85th Cong., 2d sess. 10-11 (1958).

common control (section 408, 52 Stat. 1001, 49 U.S.C. § 488); interlocking relationships (section 409, 52 Stat. 1002, 49 U.S.C. § 489); loans and financial aid (section 410, 42 Stat. 1003, 49 U.S.C. § 490); methods of competition (section 411, 52 Stat. 1003, as amended, 49 U.S.C. § 491); pooling and other agreements (section 412, 52 Stat. 1004, as amended, 49 U.S.C. § 492); immunity from anti-trust laws (section 414, 52 Stat. 1004, 49 U.S.C. § 494); and inquiry into air carrier management (section 415, 52 Stat. 1004, 49 U.S.C. § 495). Section 416, *supra*, the last section of Title IV, authorizes the Board to create classes of air carriers and to exempt any air carrier or any such class of air carriers from any or all provisions of Title IV. It is provided that any such exemption granted by the Board shall be predicated upon certain findings.

Except to the extent to which the Board may exempt under section 416, *supra*, from any such economic regulatory requirement of the Act, including any requirement imposed thereunder by the Board by way of rule, regulations, condition, limitation or otherwise, every air carrier must comply fully with every such statutory and regulatory requirement.

To exempt a carrier from the entire Title, *i.e.*, all economic regulation, or from any particular statutory or regulatory requirement, whether it be from the basic one of securing a certificate of public convenience and necessity by way of initial or additional operating authority or from some lessor statutory or regulatory requirement such as that of filing of reports, the Board must find that enforcement of the entire Title IV or of any particular section or regulatory requirement thereunder "is or would be an undue burden on such air carrier or class of air carriers. . . ." and that such enforcement is not in the public interest.

In addition, section 416 contains language describing the nature of required subsidiary findings "by reason" of which the "undue burden" exists. It is provided that the undue burden be "by reason of the limited extent of or unusual circumstances affecting, the operations of such air carrier or class of air carriers. . . ."

By section 401 a certificate of public convenience and necessity is required to authorize a carrier to carry United States mail. Seaboard, already having a certificate authorizing cargo operations, applied for a certificate amendment to authorize it to carry mail. R. 26. The grant of this certificate amendment could be made only after public hearing and all of the procedural steps necessarily incident to a full administrative proceeding. The minimum time normally required for such a proceeding would be a matter of months, generally at least a year. Seaboard's certificate amendment application was filed on 7 February 1958, along with a motion for expeditious action. R. 28, 29. Immediately after filing its application and motion to expedite, Seaboard applied for authority by way of exemption to carry mail pending final decision on its certificate amendment application. R. 49.

The Board found in its opinion granting the exemption which was set aside by the court below, that Seaboard's financial condition was so serious that its "existence was in jeopardy," that to "deprive the carrier of the opportunity to earn these [mail] revenues pending decision on its certificate application would impose an undue burden on it and would not be in the public interest." R. 108-109. The Board enunciated its own conception of the nature of its exemption powers as being "designed to afford it the flexibility needed to meet changing conditions for the over-all development and good of the air transportation system." R. 108. With reference to its responsibility under the Act, it stated: "We have a duty to give the carrier as much aid and encouragement

for economic survival as we can within the previsions of the Act." R. 109. The Board concluded that the authority conferred by the exemption was "limited in extent and in the public interest" and that enforcement of the certificate requirement insofar as it would prevent Seaboard from carrying mail, "would be an undue burden on Seaboard by reason of the limited extent of, and unusual circumstances affecting, its operation and is not in the public interest." R. 109.

That the extent of hardship on Seaboard which would have resulted from enforcement of the certificate requirement would have been so great that for lack of immediate authority by way of exemption, Seaboard would have been compelled to discontinue operations, may be assumed on the basis of the Board's opinion and the opinion of the court below. In addition, the Board's finding that grant of the exemption was in the public interest was not disturbed by the court. The court has held that the findings subsidiary to and in support of the Board's findings of "limited extent of" and "unusual circumstances" affecting Seaboard's operations were not of a kind contemplated by the statute, *i.e.*, that the circumstances were not "unusual" and that the operations were not of "limited extent," it being the court's view that the operations referred to in the statute must be those already conducted by the carrier and not those authorized by the exemption as the Board held.

REASONS FOR GRANTING THE WRIT

The economic regulatory provisions of Title IV are alike applicable to every air carrier, whether it be an international, domestic or overseas carier, and whether it be engaged in trunkline, local service, air taxi, helicopter, or scheduled or non-scheduled air carrier operations. But for section 416 and exemptions which may be properly granted thereunder, there can be no flexibility

or selectivity in the enforcement of all economic regulatory requirements of Title IV.

Regardless of the fact that the Board may find, as it has in this case, that enforcement of any such requirement as to a particular carrier or class of carriers would constitute extreme hardship, in this instance, hardship sufficient to jeopardize the carrier's continued existence, and of the fact that it may conclude that enforcement of any such requirement is contrary to the public interest under standards set forth in the Act,[2] the board, under the decision of the court below cannot grant relief unless it can find: (1) that the already authorized operations of a carrier or class of carriers are "limited in extent" or (2) that such operations are affected by "unusual circumstances" and that by reason of one or the other of such findings, enforcement of the economic regulatory requirements in question would be an "undue burden." The court has held that financial distress, no matter how serious, cannot of itself, constitute the necessary "unusual circumstances."

That the impact of this decision on the Board's authority and upon the industry which it must develop and promote is great, requires no argument. That the decision is contrary to the Board's administrative interpretation of its statute is equally apparent.[3]

The court's view that "limited extent" can refer only to "a pre-existing condition of the carrier's operations that qualifies it for an exemption" of course, gives no weight whatsoever to the Board's long standing administrative interpretation[4] and is clearly contrary to the

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[2] Section 2 of the Civil Aeronautics Act, 25 Stat. 980, 49 U.S.C. § 402.

[3] R. 108. For previous cases in which the court below has upheld the Board's interpretation, see pp. 10-11, *infra*.

[4] *Ibid.*

statutory intent. Under its holding, all air carriers would at once appear to fall into one of two groups; those whose already authorized operations are sufficiently limited in extent to make them eligible for exemption under section 416, and those whose operations are not so limited and who are therefore not exemptable.[5] A large carrier seeking authority by way of exemption to conduct limited additional service not authorized by its certificate would necessarily be denied in the absence of "unusual circumstances" so affecting its already authorized operations as to constitute an undue burden justifying the exemption. Any small carrier seeking identical authority might secure it by exemption, regardless of unusual circumstances and solely because its existing operations are limited in extent. It cannot reasonably be contended that mere size of carriers was intended to have any such effect. The Board's interpretation that the limited extent of the operations to be authorized by exemption is a proper consideration in determining the extent of the burden incident to compliance with the applicable statutory requirement is more consistent with what must be considered to have been the statutory intent. Regardless of the extent of a carrier's already authorized operations,

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[5] Tacit in the court's opinion would seem to be a holding that no applicant for an exemption for initial operating authority could be successful. There would be no pre-existing operations, limited or otherwise. The Board authorized irregular carriers having no prior operating authority to engage in limited operations by exemption. Similarly, some two or three thousand air-taxi operators were given such initial authority by way of exemption. Section 416(b)(2) referring to certain labor provisions specifically authorizes the Board to exempt therefrom if it finds that:

> ". . . by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from *beginning* or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest. . . ." Emphasis added.

the burden of completing a certificate proceeding, for example, to secure authority to perform a service during a single month of peak traffic demand would appear to be an undue burden by reason of the limited extent of the operations to be authorized by exemption. The proceeding could not be completed in time to perform the service. A very small carrier seeking an exemption which would have the effect of increasing its total operation many fold, could hardly have been intended to be in a more favorable position than a very large carrier seeking temporary authority to perform an extremely limited additional service.

The court's holding that financial distress "standing alone" cannot constitute "unusual circumstances" appears equally insupportable. The qualifying phrase, "standing alone" apparently refers to the court's earlier statement:

> "Of course, an unusual circumstance which *causes* financial distress may be such a circumstance as to warrant relief under its exemption provision. But financial distress in and of itself, unrelated to circumstances which would render the carrier eligible, is not enough." Emphasis added.

The court has held then that "financial distress" no matter how critical, cannot of itself, amount to an "unusual circumstance" justifying a finding of undue burden, hence an exemption, but that the same financial distress *caused* by some "unusual circumstance" might. Financial distress results from lack of revenue sufficient to cover expenses, and serious financial distress would appear to be a sufficient "unusual circumstance" itself to justify relief. The *cause* of insufficient revenues would seem to be irrelevant on the question of the *extent of the burden* resulting therefrom. Possibly reduced revenues resulting from extravagant management causing financial distress would justify denial of an exemption regardless of the burden shown. But such denial would appear to be based on a resulting finding that exemption, under the circum-

stances, would not be in the public interest and not on a finding that no *undue burden* was shown because of the fact that the *cause* of reduced revenues was not "unusual." It is difficult to visualize what cause of financial distress under the court's opinion would "render the carrier eligible" for exemption; possibly a strike or an act of God rendering operations impossible. In any event, the court's holding on "unusual circumstances" would appear virtually to eliminate economic considerations no matter how serious, as a basis for the required finding of undue burden.

Obviously, business corporations such as air carriers can be "burdened" only in a financial sense and it is believed that in the Board's administration of section 416, substantially every exemption granted is in fact granted on the basis of a need for revenue, or on the other side of the coin, the need to avoid unjustifiable expense. The Board has frequently granted such exemptions limited in point of time until the completion of certification proceedings, and has permitted unrestricted operations by both large and small carriers as to persons, property and mail during the completion of the certificate proceedings. The court below has held on three prior occasions that the Board may so exempt pending determination of certificate applications. *American Airlines* v. *Civil Aeronautics Board*, 97 U. S. App. D. C. 324, 231 F. 2d 483 (1956) (surface mail exemption)[6]; *Eastern Air Lines* v. *Civil Aeronautics Board*, 87 U. S. App. D. C. 331, 185 F. 2d 426 (1950) (exemption to Capital for cargo operations);

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[6] Although the court below attempted to distinguish the cases, it appears that the opinion of the court below is clearly in conflict with the decision of that court in American Airlines v. CAB, 231 F. 2d 483 (U.S. App. D.C. 1956), in which Judges Bastian and Prettyman concurred and Chief Judge Edgerton dissented in three separate opinions interpreting section 416 of the Civil Aeronautics Act. In that case it was held that enforcement of the certificate requirements was an undue burden because certain carriers could not have secured certificates in sufficient time to participate in a surface mail experiment.

Eastern Air Lines, v. *Civil Aeronautics Board*, No. 10,671, not reported (exemption for persons, property, and mail to Piedmont). In two other instances the court expressly indicated that the Board might exempt pending completion of proceedings on remand, and the Board did so. *Northwest Airlines* v. *Civil Aeronautics Board*, 90 U. S. App. D. C. 158, 194 F.2d 339 (1952); *Greensboro-High Point Airport Authority* v. *Civil Aeronautics Board*, 97 U. S. App. D. C. 358, 231 F.2d 517 (1956). In all of these cases the justification for the exemption is revenues.

Flexibility in the Board's authority to use its exemption powers is essential to enable it to carry out its duties and regulatory functions under the Act and to assure to carriers statutory rights to which they are entitled. The judgment and opinion of the court below unless set aside, will seriously hinder future administration of the Civil Aeronautics Act and proper promotion and development of the industry.[7] The Supreme Court has held that such

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[7] In line with the Board's duties of promotion and development of the air industry in conformity with the public interest, it has created new classes of air carriers and granted special exemptions for required services which have contributed substantially to the air industry. Some examples are the following:

"Aside from helping to meet the immediate travel needs of the public, the irregular air carriers have played a significant role as innovators in air transportation. It was they who made an invaluable contribution to air transportation by risking their own capital to pioneer in and develop the field of low-cost coach-type air transportation. And it was largely as a result of such successful experimentation that the certificated trunkline carriers became active participants in this field. This has made air transportation available to travelers who could not afford first class accommodations. Today, air coach travel is a vital and growing segment of the industry. . . ." Large Irregular Air Carrier Investigation, C.A.B. Order No. E-9744 (mimeo. 1955).

"The transportation of air freight on a common carrier basis is truly a new product of the postwar period. It was not until the latter part of 1946 that any appreciable volume of freight was carried, and even in October 1947, freight

circumstances justify issuance of a writ of certiorari. *FTC v. American Tobacco Co.*, 274 U. S. 543 (1927). The decision of the court below concerns a question of such importance to the Board's regulatory function that it urgently requires review by this Court. *Massachusetts Bonding v. United States*, 352 U. S. 128 (1956); *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270 (1956); *Reed v. Pennsylvania R.R.*, 351 U. S. 500 (1956); *Czaplicki v. The*

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constituted only 15 percent of the total traffic of all air carriers. The all-cargo carriers, which during 1947 accounted for approximately half of the total air freight volume of the industry, have been permitted to offer regular service as common carriers only since June 10, 1947, the effective date of section 292.5 of the Economic Regulations. Experience during the war demonstrated the physical possibility of carrying substantial volumes of cargo by air. Further, the development of new aircraft and improved operating procedures pointed to cost reductions which indicated the feasibility of rate levels which would attract a substantial volume of cargo traffic. In the light of these conditions, a group of new carriers undertook to develop a specialized freight service without dependence on Government support to cover possible operating losses. The entry of these carriers into the air freight field on this basis constitutes an experiment of great importance to the public as a test of whether a specialized air freight industry can be developed on the basis of its own economic ability to exist." Air Freight Rate Investigation, 9 C.A.B. 340, 344 (1948).

"The Board continued, through the year July 1, 1956-June 30, 1957, to issue exemption orders permitting transatlantic passenger charter flights to be operated by carriers not otherwise possessing authority for such service. About 200 of these flights were of the type where cost is prorated among the passengers. Each of these authorizations was subject to restrictions and safeguards designed to permit bona fide groups to obtain the advantages of low-cost transatlantic air transportation while at the same time protecting the integrity of individually ticketed services provided by the scheduled air carriers. Some 350 other charter flights were authorized, these being of the 'entity' type where the entire transportation cost is borne by the chartering organization. Most of these latter were for the Intergovernmental Committee for European Migration, and included many flights which carried Hungarian refugees to the United States last winter." 1957 C.A.B. Annual Report 15-16.

Hoegh Silvercloud, 351 U. S. 525 (1956); *United States* v. *Ryan*, 350 U. S. 299 (1956). The holding of the court below is entirely contrary to the longstanding interpretation of the Board which is entitled to, but was erroneously given, no weight by the court. *FHA* v. *The Darlington*, 27 U. S. L. W. 4015 (Nov. 24, 1958); *NLRB* v. *Coca Cola Bottling Co.*, 350 U. S. 264 (1956); *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294 (1933). Under such circumstances involving important statutory interpretation, the Supreme Court will grant certiorari. *FTC* v. *National Casualty Co.*, 78 S. Ct. 1260 (1958); *Conley* v. *Gibson*, 355 U. S. 41 (1957); *LaBuy* v. *Howe Leather Co.*, 352 U. S. 249 (1957); *NLRB* v. *Truck Drivers Local Union*, 353 U. S. 87 (1957); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* 350 U. S. 332 (1956); *NLRB* v. *Coca Cola Bottling Co.*, *supra*; *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358 (1955); *Wilko* v. *Swan*, 346 U. S. 427 (1953); *FCC* v. *RCA*, 346 U. S. 86 (1953).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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WALTER D. HANSEN
Attorneys for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14497

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
SEABOARD AND WESTERN AIRLINES, INC., INTERVENOR

No. 14506

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
SEABOARD AND WESTERN AIRLINES, INC., INTERVENOR

PETITIONS FOR REVIEW OF ORDER OF THE
CIVIL AERONAUTICS BOARD

Filed November 18, 1958

Mr. Elihu Schott of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Henry J. Friendly* and *Robert G. Barnard* were on the brief, for petitioner in No. 14497.

Mr. Henry P. Berens, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court,

with whom *Messrs. George A. Spater, William Caverly* and *Charles Pickett* were on the brief, for petitioner in No. 14506.

Mr. O. D. Ozment, Assistant General Counsel, Litigation and Research, Civil Aeronautics Board, with whom *Messrs. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, and *Henry Geller* Attorney, Department of Justice, were on the brief, for respondent. *Mr. Morris Chertkov*, Assistant Chief, Litigation and Research, Civil Aeronautics Board, and *Mr. Daniel M. Friedman*, Attorney, Department of Justice, also entered appearances for respondent.

Mr. Hardy K. Maclay, with whom *Mr. Walter D. Hansell* was on the brief, for intervenor.

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER, and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* On May 16, 1938, the Civil Aeronautics Board granted Seaboard and Western Airlines, Inc.[1] (intervenor) an exemption under § 416(b) of the Civil Aeronautics Act, 52 Stat. 1004 (1938), 49 U.S.C. § 496(b). This grant permits Seaboard to carry United States mail across the Atlantic while the Board considers and determines Seaboard's application for certificate authority to carry such mail. Pan American World Airways, Inc.[2] and Trans World Airlines, Inc.,[3] the only United States airlines presently certified for transatlantic mail carriage, separately petitioned this court for review of the exemption grant. Civil Aeronautics Act, § 1006, 52 Stat. 1024 (1938), 49 U.S.C. § 646. The cases were consolidated and came on for hearing.

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[1] Hereinafter called Seaboard.

[2] Hereinafter called Pan American.

[3] Hereinafter called TWA.

Both petitioners contend that this exemption grant contravenes the certification requirements of § 401 of the Act, 52 Stat. 987 (1938), 49 U.S.C. § 481, because it is not supported by requisite findings. TWA additionally contends that the exemption was invalid because it lacked the President's signature. Civil Aeronautics Act, § 801, 52 Stat. 1014 (1938), 49 U.S.C. § 601.

I.—Presidential Approval

We are obliged first to consider TWA's contention that the exemption authorization, which is an exemption *from* the requirement for a certificate, is invalid because it did not have presidential approval under § 801 of the Act. The Board and intervenor urge such approval is not required. No court has passed directly on this question.

Section 801 of the Act deals in terms of "issuance, denial, transfer, amendment, cancellation, suspension or revocation of, and the terms, conditions, and limitations contained in any certificate authorizing an air carrier to engage in overseas or foreign air transportation . . . ." and these require presidential approval. The *Waterman* case[4] makes clear that Board action affected by this provision (§ 801) is not subject to judicial review. Hence, if § 801 applies, these petitions must be dismissed for lack of jurisdiction.

We are not persuaded, however, that an *exemption* which for a limited period authorizes a carrier to transport overseas mail between points already receiving certified cargo service from the same carrier is subject to the restrictions of § 801. Section 801 contains no reference to exemptions although it recites explicitly a whole series of Board actions relative to certificates affected by the statute. True, the exemption has operative effects not unlike an amendment of a certificate, but the extraordi-

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[4] Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

nary power vested in the Executive by this statute should not be expanded beyond the needs of the foreign relations considerations which have been relied on to justify the grant. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, note 4 *supra* at 111.

These factors—the uniqueness of the statutory provision, its drastic impact, the precise definition of the statute, and the Board's interpretations fortify the conclusion that Congress did not intend to include exemptions in § 801. The enduring and continuing character of the operations under a certificate as contrasted with the temporary and limited character of the exemption supply the most important basis for distinction.

II.—Validity of the Exemption

Section 416(b) of the Act[5] permits the Board to exempt an air carrier from the certificate requirements of § 401 if, but only if it first finds that enforcement of those requirements would have certain specified results because of the existence of certain specified conditions. The Board must find that the "operations" of the air carrier seeking the exemption are either (1) of "limited extent" or (2) affected by "unusual circumstances." Aside from finding that one of these conditions is present, the Board must also find that that condition *causes* enforcement of the certificate requirements to work "an undue burden" on the carrier. Finally, the Board must find that enforcement of the requirements "is not in the public interest." In the absence of any one of these findings the Board is not authorized to suspend the normal statutory requirements

[5] "The Board . . . may . . . exempt from the requirements of this subchapter or any provision thereof . . . any air carrier . . . if it finds that the enforcement of this subchapter or such provision . . . is or would be an undue burden on such air carrier . . . by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier . . . and is not in the public interest." 52 Stat. 1004 (1938), 49 U.S.C. § 496(b)(1).

of notice, hearing and requisite findings for issuance of a certificate of public convenience and necessity.

Nor may these findings be merely a recital of § 416(b). The Board "must find what the statute requires it to find, not in conclusory fashion in the statutory language but in such fashion that a reviewing court can test the validity of the finding." *American Airlines, Inc.* v. *CAB*, 98 U.S.App.D.C. 348, 356, 235 F.2d 845, 853 (1956).

The Board's findings in this case are short and somewhat cursory, consisting of but three paragraphs. It found that "Seaboard's financial situation is acute," and that "Seaboard's existence is in jeopardy." With no further preliminaries it found that

> To deprive the carrier of the opportunity to earn these revenues [from mail carriage] pending decision on its certificate application would impose an undue burden on it and would not be in the public interest.

It found that the diversion of mail revenues from Pan American and TWA would be slight but that "the benefit to Seaboard will be relatively substantial." From these premises the Board concluded "that the authority conferred by exemption is limited in extent and in the public interest."[6] Finally the Board's order recited the language of § 416(b) in concluding that the exemption should be granted.

Without considering the problem of whether these findings are supported by the record, we hold them inadequate to meet the statutory requirements. The "undue burden" the Board has found is deprivation of revenues during the course of certification proceedings. This "burden" is found to be "undue" because of the financial straits in which Seaboard finds itself. Obviously, any carrier not granted

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[6] The Board seems to have misunderstood the "limited extent" requirement. The statute does not refer to the limited extent of the exemption itself; instead it refers to a pre-existing condition of the carrier's operations that qualifies it for an exemption.

an exemption will be "deprived" of an opportunity to earn revenues from a particular carriage until it is awarded a certificate therefor. The Board has found only one circumstance here that is not present in every certification proceeding: Seaboard's financial distress. This is insufficient. If Congress had wanted to exclude economically marginal carriers from certification requirements, it would have done so in more explicit terms than those of § 416(b).[7] Of course, an unusual circumstance which causes financial distress may be such a circumstance as to warrant relief under this exemption provision. But financial distress in and of itself, unrelated to circumstances which would render the carrier eligible, is not enough.

In the *Surface Mail Experimental Case*[8] we upheld an exemption grant, but even there the decision was close under circumstances far more compelling than those here. That exemption permitted certain all-cargo air carriers to participate in a Post Office experiment to determine whether it would be economical and feasible to send some surface mail by air. It was found that certification proceedings, even on an interim basis, could not be completed in time to enable the exempted carriers to participate in the experiment. The court plainly relied heavily on this finding, and Judge Prettyman in concurring said: "In such event denial of an exemption would be a total and

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[7] It is pertinent that, when Seaboard was initially given a transatlantic cargo certificate, the Board said:

> "Since the service will not be subsidized, it becomes a matter for the new carrier and its shareholders to determine whether as a matter of business judgment it desires to venture its capital in this enterprise . . . . [*sic*] All of the applicants are fully aware of the attendant risks, and all are actively seeking the opportunity to prove the economic feasibility of this venture." *Transatlantic Cargo Case*, Order No. E-9311, CCH AV.L.REP. (CAB Cas. 1954-57) ¶ 21,845.02 at 14,310 (1955).

[8] American Airlines, Inc. v. CAB, 97 U.S.App.D.C. 324, 231 F.2d 483 (1956).

final deprivation of participation. That is not the case in the usual application for exemption."[9]

Additionally, in the *Surface Mail Experiment Case* the Post Office recommended an exemption, reasoning that (a) additional mail volume was anticipated; (b) the cargo carriers would provide protection against service interruptions; and (c) by participation in the experiment the carriers would gain valuable experience. In the present case the Post Office has taken a position that at best might be called neutral. It has said that "there is more capacity than currently needed for the transportation of airmail from the New York Gateway to European points and consequently there is not the peculiar need for exemption which existed because of the airlift experiment . . . " These comments by the Post Office Department tend to weaken the Board's conclusory finding in this case that enforcement of the certificate requirements would not be in the public interest. It is not necessary to hold, however, that this finding has "no rational basis." We hold only that financial distress is not a circumstance which, standing alone, meets the requirements of § 416(b). Accordingly, we set aside the order granting an exemption to Seaboard.

Order Set Aside.

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[9] 97 U.S.App.D.C. at 329, 231 F.2d at 488.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 1958

No. 14,497

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
SEABOARD & WESTERN AIRLINES, INC., INTERVENOR

No. 14,506

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
SEABOARD & WESTERN AIRLINES, INC., INTERVENOR

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER, and BURGER, *Circuit Judges*.

ORDER

The above-entitled cases came on to be heard on the record from the Civil Aeronautics Board and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED by the court that the order of the Civil Aeronautics Board on review in these cases is hereby set aside. An opinion will be filed later.

It is FURTHER ORDERED by the court that a certified copy of this order issue forthwith to the Civil Aeronautics Board.

Per Curiam.

Dated: NOVEMBER 14, 1958

APPENDIX C

RELEVANT PROVISIONS OF CIVIL AERONAUTICS ACT

Sec. 2. [52 Stat. 980, as amended, 49 U.S.C. § 402] In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce and in such manner as to best promotes its development and safety; and

(f) The encouragement and development of civil aeronautics.

* * * *

Sec. 401 [52 Stat. 987, as amended, 49 U.S.C. § 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation. . . .

* * * *

(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

* * * *

(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition or limitation of such certificate. . . .

* * * *

Sec. 416 [52 Stat. 1004, as amended, 49 U.S.C. § 496] (a) The Authority may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority finds necessary in the public interest.

(b) (1) The Authority, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provisions, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Authority shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Authority finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to abstruct its development and prevent it from beginning or continuing

operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Authority to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.